# Low Sek Chee & Ors v Soo Seng Co Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-22-65 OF 1988
MOHD NOOR AHMAD J
30 JANUARY 1999

***Contract** — Repudiation — Sale of land — Whether plaintiff could accept repudiation and claim damages — Whether plaintiff may claim damages notwithstanding failure to mitigate losses — Contracts Act 1950 s 40*

The plaintiffs — who were proprietors of undivided shares in a piece of land — sold their respective shares in the land to the defendant under respective sale and purchase agreements ('the agreements') which contained similar terms. Among the terms were that the plaintiffs were required to remove all caveats on the land, for which no time limit was specified, and that the earnest money amounting to 10% of the purchase price was forfeitable in the event of the defendant's default was to be paid by way of a bank guarantee. When the bank guarantee expired, the plaintiffs sought to call the deal off but the defendant renewed the bank guarantee. The defendant later did not renew the bank guarantee as the caveats have not been removed and inquired as to when the caveats would be removed. After more than a year, the plaintiffs managed to remove the caveats and demanded for the payment of the earnest money. By now, the defendant was not interested in purchasing the land. The plaintiff accepted the repudiation of the contract and sued the defendant for damages.

**Held**, partly allowing the plaintiffs' claim:

The plaintiffs were entitled to their claim for 10% of the purchase price as agreed liquidated damages as they have effectively accepted the repudiation of the contract under s 40 of the Contracts Act 1950. On the facts, the defendant had prior knowledge of the existence of the private caveats and there was no time limit for its removal. As the defendant had turned down the plaintiffs' request for the deal to be called off, the contracts were still subsisting and it was the defendant that repudiated the contract (see p 173C–F). The plaintiffs were however not entitled to claim damages as loss being the difference between the actual value of the land and the purchase price agreed to by the parties as they have failed to mitigate their losses from the date of the breach (see p 173H–I).

**[Bahasa Malaysia summary**

Plaintif-plaintif — yang merupakan tuan punya-tuan punya sebidang tanah yang tidak dibahagi — telah menjual bahagian mereka di atas tanah kepada defendan di bawah perjanjian jual beli masing-masing yang mengandungi terma-terma yang sama. Antara terma-terma

adalah bahawa plaintif-plaintif adalah dikehendaki untuk mengalihkan kaveat di atas tanah, di mana tempoh had masa masa tidak dinyatakan, dan bahawa cengkeram yang berjumlah 10% harga belian boleh ditarik balik dalam keadaan keingkaran defendan akan dibayar dengan cara gerenti bank. Apabila gerentii bank tersebut luput, plaintif telah meminta untuk membatalkan perjanjian tersebut tetepi defendan telah memperbaharui gerenti bank tersebut. Kemudian defendan tidak memperbaharui gerenti bank oleh kerana kaveat belum dialihkan dan telah menanya bila kaveat boleh dialihkan. Selepas lebih daripada setahun, plaintif-plaintif berjaya mengalihkan kaveat tersebut dan menuntut utnuk pembayaran cengkeram tersebut. Menjelang masa ini, defendan tidak berminat untuk membeli tanah tersebut. Plaintif telah menerima pembatalan kontrak tersebut dan telah mendakwa defendan untuk ganti rugi.

**Diputuskan**, membenarkan sebahagian tuntutan plaintif:

Plaintif-plaintif berhak kepada tuntutan mereka untuk 10% harga belian sebagai ganti rugi tertentu yang dipersetujui oleh kerana mereka telah secara efektif menerima pembatalan kontrak di bawah s 40 Akta Kontrak 1950. Di atas fakta, defendan mempunyai pengetahuan sebelumnya mengenai kewujudan kaveat persendirian dan tiada had masa untuk pengalihannya. Oleh kerana defendan telah menolak permintaan plaintif untuk perjanjian tersebut dibatalkan, kontrak tersebut masih berterusan dan defendanlah yang telah membatalkan kontrak tersebut (lihat ms 173C–F). Namun plaintif-plaintif adalah tidak berhak untuk menuntut ganti rugi sebagai kerugian untuk perbezaan antara nilai tanah yang sebenar dan juga harga belian yang dipersetujui oleh pihak-pihak oleh kerana mereka gagal untuk mengurangkan kerugian mereka dari tarikh kemungkiran tersebut (lihat ms 173H–I).]

**Notes**

For cases on repudiation generally, see 3 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2735–2742.

**Legislation referred to**

Contracts Act 1950 s 40

*Joseph Yeo (Rajah, Lau & Associates)* for the plaintiff.
*V Balasingam (Balasingam & Co)* for the defendant.

*Cur Adv Vult*

**Mohd Noor Ahmad J**: The plaintiffs sued the defendant for damages in lieu of specific performance.

(1) The plaintiffs who were the registered proprietors of certain undivided shares in the land held under Geran No 20697, Lot No 15594,

Mukim Klang, Daerah Klang Selangor ('the land') sold their respective shares in the land to the defendant under the respective sale and purchase agreements executed on various dates (collectively referred to as 'the agreements'). A

(2) The agreements contain identical terms and conditions save for the different undivided share in the land and the consideration. The pertinent provisions in the agreements are para 3 of the Third Schedule and cl 4. Under the former, the plaintiffs were required to remove all the caveats on the land for which no time limit was specified and under the latter the first 10% payment of the purchase price was stipulated to be earnest money which was forfeitable in the event of the defendant's default. By reason of the existence of several private caveats lodged by a third party on the land, which the defendant had knowledge, the first 10% payment of the purchase price in the sum of RM414,123.13 shall be paid by way of a bank guarantee to be discounted simultaneously with the second payment of 30% of the purchase price. B C D

(3) Pursuant to such terms the defendant provided the plaintiffs with three bank guarantees on 24 January 1984, 26 January 1984 and 8 February 1984 valid for six months, which subsequently expired and the land was still encumbered with the caveats. The plaintiffs through their solicitors wrote to the defendant's solicitors stating that since the defendant had failed to renew the guarantees and pay interest and since the plaintiffs themselves still had not been able to remove the caveats, the plaintiffs were calling off the deal. The plaintiffs also returned RM10,000,00 to the defendant allegedly to be the option money. About three weeks later the defendant through its solicitors wrote to the plaintiffs' solicitors stating that the renewed guarantees had already been sent, no interest was as yet due to the plaintiffs and that the plaintiffs could not call off the deal as there was no time frame set for the removal of the caveats. Then $1^1/_2$ months after the renewed guarantees had expired, the plaintiffs through PW1 wrote to the defendant stating that since the guarantees had expired and were not renewed the plaintiffs were terminating the agreements and treating them as null and void. In response thereto the defendant gave the plaintiffs the second renewed guarantees valid for one year. About six months after the expiry of the second renewed guarantees the plaintiffs' solicitors wrote to the defendant's solicitors terminating the agreements on the same ground that the defendant had failed to renew the guarantees. The defendant responded some three months later through its solicitors' letter by stating that due to the plaintiffs' inability to remove the caveats the defendant had decided not to give any further guarantee until the caveats were removed and that there was no purpose in giving the guarantees as the plaintiffs were not able to sell the land free from encumbrances, and also the defendant inquired from the plaintiffs as to when the plaintiffs would be in a position to sell the land free from encumbrances. The plaintiffs did not respond to the defendant's proposal and query. However, about E F G H I

more than one year later the plaintiffs' solicitors wrote to the defendant's solicitors informing that the Court had ordered for the removal of the caveats and thereby demanded from the defendant the payment of 10% of the purchase price and interest thereon. About two weeks later the defendant replied through its solicitors' letter stating that it was no longer interested in the deal because the plaintiffs had unduly delayed in the removal of the caveats. The plaintiff's solicitors replied accepting the repudiation and intimated that the plaintiffs would elect to proceed against the defendant for damages in lieu of specific performance.

On the facts, I am satisfied that:

(1) The defendant knew from the beginning of the existence of the private caveats on the land.

(2) The agreements do not prescribe the time limit for the caveats to be removed and the defendant did not subsequently make time the essence of the contract for the purpose, eventhough the plaintiffs took a long time to have the caveats removed.

(3) The defendant had turned down the plaintiffs' request to call off the deal. Therefore, the contracts were subsisting.

(4) After the court ordered the caveats to be removed, the defendant repudiated the contracts and the plaintiffs accepted the repudiation.

By reason of s 40 of the Contracts Act 1950, when the defendant clearly repudiated the contracts, the plaintiffs had an option either to accept the repudiation and sue for damages for breach of contract or to disregard or refuse to accept it in which case the contracts remained in full effect. Since the plaintiffs had accepted the repudiation and indicated to the defendant that the plaintiffs would proceed for damages in lieu of specific performance, the plaintiffs are entitled to sue the defendant for damages.

As the plaintiffs had effectively rescinded the agreements, the plaintiffs are entitled to the deposit of RM414,123.13 representing 10% of the purchase price as earnest money and forfeitable as agreed liquidated damages under the respective cl 4 of the agreements. To my mind, the sum is reasonable.

The plaintiffs also claimed RM1,711,231.54 from the defendant as loss being the difference between RM2,420,000 (the value of the land at the approximate date of the breach) and RM4,141,231.54 (the purchase price) after taking into consideration the sum of RM10,000 paid by the defendant. I am of the view that the plaintiffs are not entitled to this claim because the land was subsequently sold to another party for a much higher price and the plaintiffs failed to mitigate their loss from the date of the breach (19 December 1987) until the land was sold nearly two years later. Hence, I need not consider the evidence of the valuer (SP7) on the market value of the land as at the date of the breach and his valuation report.

I decline to consider and award the claim by the first plaintiff against the defendant in the sum of RM111,118.46 being the alleged extra sum for

the removal of the caveats because it was not expressly pleaded and the statement of claim was not amended for the purpose though there is evidence to that effect.

Therefore, judgment is hereby entered against the defendant as per prayers (a), (c), (d), (e) and (f).

*Plaintiff's claim partly allowed.*

Reported by Chin En Tek